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No. 85-1751

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTTMAN CUSTOM PROCESSORS, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners challenge a $900 fine imposed in civil contempt proceedings to induce their compliance with a warrant authorizing an inspection by the Department of Labor's Occupational Safety and Health Administration (OSHA).

1. Petitioner Joseph Piperato is the president of petitioner Ottman Custom Processors, Inc., an employer covered by the Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. II) 651 *et seq*. On November 19, 1984, a United States Magistrate issued a warrant requiring Ottman to permit an inspection of its premises by OSHA. When an OSHA compliance officer served the inspection warrant, on November 21, 1984, Ottman and Piperato delayed the inspection for several hours. They also refused to permit the compliance officer to question employees privately and to request the employees to explain and demonstrate the equipment with which they worked. The compliance officer consequently left the premises without completing the inspection. Pet. App. 6-7.

On December 14, 1984, the Secretary of Labor filed a petition for an adjudication of civil contempt against Piperato and Ottman in the United States District Court for the District of Massachusetts. On January 21, 1985, the district court issued an order requiring Ottman and Piperato to show cause why they should not be adjudicated in civil contempt for refusing to comply with the inspection warrant. Testimony was presented at a hearing on the order and both parties submitted post-hearing briefs. Pet. App. 6.

In a memorandum opinion and order dated May 15, 1985, the district court concluded that the inspection warrant was valid (Pet. App. 7). The court found that Ottman and Piperato had refused to allow a "normal and meaningful inspection" of Ottman's premises and that their conduct "totally frustrated reasonable attempts by the Labor Department to inspect those premises as mandated by Congress under the Act" (*ibid.*). Based on these findings, the court held both Ottman and Piperato in civil contempt for refusing to comply with the inspection warrant (*ibid.*). It ordered Ottman to pay a fine of $200 per day and Piperato to pay a fine of $100 per day "until the Magistrate's order is fully complied with" (*ibid.*).

Ottman and Piperato received the district court's order on May 17, 1985 (Pet. 2). On May 20, 1985, the compliance officer returned to Ottman to conduct the inspection, which was completed on the same date (*ibid.*). Thereafter, at the Secretary's request, the district court assessed the fines imposed by the court's May 15, 1985, order against Ottman and Piperato for each of the days from May 16, 1985 through May 19, 1985 (Pet. App. 2). The fine thus totalled $1,200 (*ibid.*).

The court of appeals affirmed in part. It held that the district court should not have assessed fines for May 16 since Ottman and Piperato did not receive the district court's order until May 17 (Pet. App. 3). The court,

however, rejected the argument of Ottman and Piperato that they were unable to comply with the order before May 20 as "either superficial or disingenuous," since Ottman and Piperato "held the key to purgation—a simple telephone call to OSHA stating that defendants would no longer resist inspection" (*ibid.*). The court of appeals therefore upheld the district court's decision to assess fines for May 17 through May 19 because "[w]ith a record in this proceeding of resistance to inspections, both warrantless and with warrant, and findings by both magistrate and judge regarding such resistance, defendants were in no position to assume that sitting on their hands would toll the fines" (*ibid.*). Consequently, the court vacated the district court's order of September 5, 1985, and remanded the case with instructions to assess a total fine of $900 (*id.* at 4).

2. The court of appeals correctly decided that the district court did not abuse its discretion by assessing fines from May 17 through May 19. The court's decision does not conflict with any decision of any other court of appeals or with any decision of this Court. The decision, moreover, involves only the application of judicial discretion and well-settled legal principles to the particular facts of this case. It therefore plainly does not warrant review by this Court.

Petitioners primarily contend that the courts below impermissibly imposed punitive fines in a civil contempt proceeding without affording petitioners the due process required in a criminal contempt proceeding.[1] Petitioners err

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[1] The fundamentals of due process in civil contempt proceedings are notice and an opportunity to defend. *Skinner* v. *White*, 505 F.2d 685, 690 (5th Cir. 1974); *Parker* v. *United States*, 153 F.2d 66, 70 (1st Cir. 1946). Although more stringent protections may apply in criminal contempt proceedings (see *Bloom* v. *Illinois*, 391 U.S. 194, 209 (1968); Fed. R. Crim. P. 42(b)), those protections are not prerequisites to orders imposing coercive civil sanctions. *Latrobe Steel Co.* v.

in contending that the sanction imposed in this case is a criminal, or punitive, fine rather than a civil, or coercive, fine. Criminal contempt vindicates the authority of the court by punishing past acts of disobedience. See, *e.g.*, *McDonald's Corp.* v. *Victory Investments*, 727 F.2d 82, 87 (3d Cir. 1984); *In re Irving*, 600 F.2d 1027, 1031 (2d Cir.), cert. denied, 444 U.S. 866 (1979); *Latrobe Steel Co.* v. *United Steelworkers Local 1537*, 545 F.2d 1336, 1343 (3d Cir. 1976). Thus, in criminal contempt proceedings, a court may impose a fine that is unconditional and payable even if the contemnor complies with the court's order on the same day that it is issued. Civil contempt, on the other hand, benefits the plaintiff by coercing present or future compliance with the court's order. *In re Dinnan*, 625 F.2d 1146, 1149 (5th Cir. 1980). In civil contempt proceedings, therefore, a court is limited to imposing coercive fines that are prospective and wholly contingent on the contemnor's continued noncompliance. See, *e.g.*, *McDonald's Corp.*, 727 F.2d at 87; *Latrobe Steel Co.*, 545 F.2d at 1343-1344 & n. 34, 35.[2]

The fines in this case were wholly conditional upon petitioners' compliance with the inspection warrant. The fines were prospective only and payable only until the completion of an inspection in accordance with the inspection warrant. Petitioners, moreover, "held the key to purgation," as the court of appeals noted (Pet. App. 3), and

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United Steelworkers Local 1537, 545 F.2d 1336, 1343 n.33 (3d Cir. 1976). In this case, the district court notified petitioners of the Secretary's petition for an adjudication of civil contempt in the show-cause order dated January 21, 1985, and afforded petitioners an opportunity to defend both at the hearing on the order and in a post-hearing brief (Pet. App. 6). No further protections were required to order payment of a civil fine. See *United States* v. *Westinghouse Electric Corp.*, 648 F.2d 642, 652 (9th Cir. 1981).

[2] Civil contempt also may be employed to compensate a complainant for actual losses sustained. *United States* v. *United Mine Workers*, 330 U.S. 258, 303-304 (1947). The district court ordered petitioners to pay compensatory damages totalling $3,279.57, and petitioners have not challenged that award (Pet. 5 n.1).

"could have purged themselves of contempt and of any fine through timely compliance" (*United States* v. *Westinghouse Electric Corp.*, 648 F.2d at 651). In these circumstances, it is clear that the fines were coercive, not punitive, and that they were properly imposed in the civil contempt proceedings below. See *Shillitani* v. *United States*, 384 U.S. 364, 368-370 (1966); *Westinghouse Electric Corp.*, 648 F.2d at 651; *In re Dinnan*, 625 F.2d at 1149.[3]

Petitioners argue (Pet. 5) that the fines imposed were punitive because they were assessed four months after they had consented to the inspection when there was no longer any "need to coerce compliance." But the question whether sanctions are punitive or coercive depends on the purpose for which they were imposed (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 443 (1911); *Shillitani*, 384 U.S. at 368-370), and the district court plainly imposed the sanction to insure that petitioners would comply promptly with the inspection warrant. The court of appeals recognized that petitioners needed to be motivated to comply, noting that "the background of intransigence was such that * * * the Secretary might well assume that difficulties would continue" (Pet. App. 3).[4]

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[3] Petitioners' suggestion (Pet. 5) that the district court's imposition of fines was not conditional because the order did not specify means by which the contemnor could purge itself of contempt is frivolous. While such a purge clause might be included in an order imposing a determinate sentence (see *Shillitani*, 384 U.S. at 370 n.6), it is plainly unnecessary where, as here, the order merely directs the payment of fines "until the Magistrate's order is fully complied with" (Pet. App. 7).

[4] Contrary to petitioners' suggestion (Pet. 5-6), their circumstances are plainly unlike the circumstances of the contemnors in *McDonald's Corp.*, 727 F.2d at 85, where a contempt order dated February 10, 1983, imposed fines for past disobedience beginning on October 14, 1982, since the fine imposed on petitioners was prospective only. Moreover, the contempt order in this case is unlike the order in *In*

Petitioners also argue that they were unable to comply with the inspection warrant before May 20 because the OSHA inspector did not appear before that date (Pet. 4). Although inability to comply may be a defense to civil contempt (see *Newman* v. *Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984)), the court of appeals properly rejected petitioners' contention because petitioners made no effort to comply before May 20 (Pet. App. 3). Instead, petitioners incorrectly assumed that "sitting on their hands would toll the fines" (*ibid.*). See *Powell* v. *Ward*, 643 F.2d 924, 931 (2d Cir.), cert. denied, 454 U.S. 832 (1981). If petitioners had simply called OSHA on May 17 and stated that they would comply with the inspection warrant, it is apparent that the court of appeals would not have permitted the imposition of a fine.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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re Irving, 600 F.2d at 1031, which levied a per-diem fine "regardless of subsequent compliance"; here the fine was terminated by compliance with the inspection warrant.

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